Filed 6/7/10 In re H.S. CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re H.S. et al., Persons Coming Under the Juvenile Court Law.	
ORANGE COUNTY SOCIAL SERVICES AGENCY, Plaintiff and Respondent, v. Kenneth S., Defendant and Appellant.	G043005 (Super. Ct. Nos. DP012302, DP012303 & DP018889) O P I N I O N

Appeal from orders of the Superior Court of Orange County, Salvador Sarmiento, Judge. Affirmed.

Marsha F. Levine, under appointment by the Court of Appeal, for Defendant and Appellant.

Nicholas S. Chrisos, County Counsel, Karen L. Christensen and Debbie Torrez, Deputy County Counsel, for Plaintiff and Respondent.

No appearance for the Minor.

Kenneth S. (father) appeals from the juvenile court's orders continuing dependency jurisdiction over his 7-year-old daughter H.S. and 4-year-old son B.S., declaring dependency over his 1-year-old son J.S., and removing them from his custody. He contends the proceedings under Welfare and Institutions Code section 387 (all further statutory references are to this code) instead of section 388 for the two older children were unauthorized and that clear and convincing evidence did not support the removal orders. Finding no error, we affirm the orders.

FACTS

Orange County Social Services Agency (SSA) took the two older children into protective custody in September 2005 after mother (not a party to this appeal) was arrested for violating her probation and father's residence in a Sober Living home precluded placement with him. Both parents had criminal histories involving possession of controlled substances.

After the children were detained, father moved into and childproofed an apartment and tested negative for drug and alcohol use. The social worker recommended that his drug testing requirement be discontinued subject to reinstatement if his sobriety became questionable. At the dispositional hearing in January 2006, the court declared the children dependents and placed them with father under a family maintenance plan under which, among other things, he was to submit twice-weekly to drug testing at SSA's request upon suspicion of drug use. Father was advised that "[a] missed test is to be considered a positive test."

By July, mother had moved in with father and the children. The social worker commended father for providing a suitable home and staying sober. Because of his earlier negative drug tests, father had stopped drug testing and the counseling

requirement was deleted from his service plan. The court ordered an additional six months of supervision with the children placed with both parents.

Before the next hearing, mother was arrested for cocaine use. Because father claimed ignorance of her drug use, the social worker had him "submit to random drug testing to confirm [his] continued sobriety." The court set another six-month review and placed the children in father's supervised custody.

As of June 2007, mother had resumed living with father and the children. Although father was to submit to random drug testing, upon SSA's request, SSA did not ask him to test during this period. The social worker had met with him "on several occasions and there did not appear to be any indication of alcohol use." Father had difficulty completing his parenting education classes and received a referral for in-home classes. The children remained in the supervised custody of both parents and another six-month review hearing was set for December.

Several months later, an open bottle of alcohol was found in the home, which violated mother's probation. Both parents tested negative for alcohol. Father was "cooperating with in[-]home parenting," although it had taken him "[one] year to finally enroll and attend a parenting education program."

In late 2007, H.S. set her brother's bed on fire but allegations of neglect were determined to be unfounded. A few weeks later mother tested positive for cocaine. The court ordered father to test for drugs and alcohol once a week until the next court date. Before that, the social worker had "asked father to random drug test several times and [he] ha[d] not done so," providing excuses each time. Mother was allowed to reside in the family home on the condition she immediately move out if she tested positive.

Father tested a few times with negative results but he subsequently missed some tests because of a court appearance for driving with a suspended license and misdemeanor petty theft and his 21-day incarceration for those offenses. The social worker believed "[t]he children have done fairly well despite the absence of each parent

at different times. There has been at least one parent home when the other was in custody." The children did have some difficulty listening to the parents and on one occasion H.S. wandered off unsupervised while the social worker was talking to the parents and found two blocks away. But the children were still developmentally on target.

By the end of the year, father had "completed his in[-]home parenting program" but was not "drug testing as his case plan requires once a week" and "refused to test . . . ." Nevertheless, the social worker was "not concerned that [he was] drinking or using drugs."

In March 2009, mother gave birth to J.S., with father declared the presumed father. The following month, father secured a full-time job with benefits and the children continued to do well, except that H.S. was reportedly inattentive at school.

A few months later, father's contract job ended and he did not comply with requests for on-demand drug tests in June and July. Father stated "he was too busy getting [their new] apartment set up and looking for a job to drug test." The court ordered father wear a drug patch, which was placed on him in August, and a month later tested positive for cocaine.

SSA filed a section 387 petition regarding H.S. and B.S. and a section 300 petition regarding J.S. seeking to remove father from the home. Both petitions referred to the positive toxicology screen for cocaine on the drug patch, father's failure to replace his drug patch weekly as required by his court-ordered drug testing schedule, and his failure to comply with on-demand drug tests on two occasions in June and July 2009. The section 300 petition further alleged "father's substance abuse is an unresolved problem that impairs his ability to effectively care for, parent and protect the child." Father initially refused to voluntarily move out of the house but later agreed to do so. At the detention hearing, the court released the children to mother under SSA's supervision and ordered reunification services and monitored visits for father.

SSA reported father had two positive drug patch results for cocaine in September and tested positive for alcohol once in October. Father maintained the drug patch testing was defective and resulted in a false positive. SSA also noted father missed a test in September and had been arrested and jailed for two weeks for outstanding warrants.

At the combined jurisdictional and dispositional hearing, two technicians from the agency that gave father the drug patch testified about the procedures for applying and removing the patches. Father also testified, denying that he had used cocaine during the year, that he had spent time in a room where cocaine was smoked, or that he had sexual contact with a cocaine user.

The court found the allegations of the petitions true by a preponderance of the evidence, maintained H.S. and B.S. dependent children, and declared J.S. a dependent child. It determined by clear and convincing evidence that father "has continued to abuse drugs," that continued custody with him would be detrimental to the children whose welfare required their removal from his care, and that their best interests would be served by vesting custody with mother. Father received an enhanced case plan plus visitation rights and was ordered to participate in a substance abuse treatment program with a testing component. A review hearing was set for April 2010.

DISCUSSION

1. Section 387

Father contends that, as to the two older children, SSA "should have filed a section 388 petition" to modify the existing placement order, rather than a section 387 petition, which is implicated only when a more restrictive placement is sought, because placement with mother was not more restrictive. Although he concedes he did not

present this issue in the juvenile court, he asserts it involves a legal question subject to our de novo review. (See *In re Javier G.* (2006) 137 Cal.App.4th 453, 459.)

But even legal issues are subject to forfeiture if not properly raised and our "discretion to excuse forfeiture should be exercised rarely and only in cases presenting an important legal issue. [Citations.]" (*In re S.B.* (2004) 32 Cal.4th 1287, 1293.) In general, "[i]t is unfair to the trial court and the adverse party to give appellate consideration to an alleged procedural defect which could have been presented to, and may well have been cured by, the trial court. [Citation.]" (*Steve J. v. Superior Court* (1995) 35 Cal.App.4th 798, 810-811.) Additionally, in dependency matters, an appellate court's discretion to consider such claims "must be exercised with special care" because such "proceedings involve the well-being of children." (*In re S.B.*, *supra*, 32 Cal.4th at p. 1293.)

Here, we decline to exercise our discretion to consider his claim because it is well established that a party forfeits the right to complain that a particular proceeding was improper by acquiescing or participating in it. (*In re Jamie R.* (2001) 90 Cal.App.4th 766, 771 [parent's "silence and acquiescence waived . . . statutory right to have counsel present at . . . in camera hearing"].) By failing to object to the proceedings and actively participating in them, father effectively waived the right to argue SSA should have sought an order under section 388 rather than section 387.

Moreover, father does not explain why this involves an "'important legal issue.'" To the contrary, he acknowledges that, "[n]otwithstanding SSA's mistake in proceeding by way of a section 387 petition, . . . the matter was still before the court for a six-month review . . . and for a hearing on the section 300 petition . . . , and that the court therefore had the ability to order the children's removal from his custody." The question is thus "purely academic" and we do not address it. (*Wilson v. Los Angeles County Civil Service Com.* (1952) 112 Cal.App.2d 450, 452.)

2. Removal of Children From Father's Custody

After the court found true the allegations of the section 300 and section 387 petitions by a preponderance of the evidence, which father does not contest, it proceeded to the disposition. Father challenges that portion of the disposition removing the children from his custody, arguing this was error because there was no clear and convincing evidence the children would be at a substantial risk of danger in his care and there were no alternatives to removal. We disagree.

Section 361, subdivision (c) provides that dependent children may not be removed from their parents' custody unless there is clear and convincing evidence that one of six specific conditions exist. The only condition relevant to this case is subdivision (c)(1) of section 361, which requires "a substantial danger to the physical health, safety, protection, or physical or emotional well-being of the minor if the minor were returned home, and there are no reasonable means by which the minor's physical health can be protected without removing the minor from the minor's parent's . . . physical custody."

"The parent need not be dangerous and the child need not have been actually harmed for removal to be appropriate. The focus of the statute is on averting harm to the child. [Citations.] In this regard, the court may consider the parent's past conduct as well as present circumstances. [Citation.]" (*In re Cole C.* (2009) 174 Cal.App.4th 900, 917.)

On review, we employ the substantial evidence test, bearing in mind that clear and convincing evidence requires a heightened burden of proof. (*In re Kristin H.* (1996) 46 Cal.App.4th 1635, 1654.) "We do not reweigh the evidence, evaluate the credibility of witnesses, or resolve evidentiary conflicts. [Citation.]" (*In re H.G.* (2006) 146 Cal.App.4th 1, 13.)

"The standard for removal on a supplemental petition is the same as the standard for removal on an original petition." (*Kimberly R. v. Superior Court* (2002) 96

Cal.App.4th 1067, 1077.) "The test is whether there is clear and convincing evidence the child is in physical danger if left in the home (or already suffering severe emotional damage and there is no other way to protect the minor's emotional health without removal), not whether parents are obeying a service plan." (*In re Paul E.* 1995) 39 Cal.App.4th 996, 1004, italics omitted.)

According to father, the "court's removal order was, in essence, premised on a single positive drug test" and even if he had ingested cocaine, "there was simply no risk to the children. . . . [T]here was no clear and convincing evidence . . . there would be a substantial danger to the children's health and safety if they were to remain in father's custody," that he "had neglected them," or that they "had suffered harm or injury of any kind while in [his] custody."

On the contrary, father's drug patch tested positive not once but twice for cocaine, which was his drug of choice for many years. He also failed to comply with the weekly requirement to replace the drug patch and "[w]hereas one might be able to justify one or two missed appointments, [SSA] was informed that [father] had a pattern of no-shows. [¶] A pattern of missed appointments to comply with drug patch regulations is of concern particularly when one considered [his] failure to comply with 'on[-]demand' drug testing." The record shows father missed a number of drug tests, including in the two months before the court ordered him to wear a drug patch. SSA considered a missed test a positive test, and the juvenile court was entitled to draw its own inferences from those results.

Father asserts that because "substance abuse alone, without some evidence that the child is at risk of harm, cannot support juvenile court jurisdiction," "proof of a positive drug test (or even four positive drug tests) alone does not equate to detriment absent a showing that the child was, as a result, at risk of some harm." But here, there was more than just a few positive drug tests. Father had a history of substance abuse dating back to 1993. He also had a pattern of missed drug tests, which "we must

consider . . . to be positive tests" (*Jennifer A. v. Superior Court* (2004) 117 Cal.App.4th 1322, 1343) and missed appointments for replacing the drug patch. Further, he denied "he had used cocaine at any time," despite his positive patch test results. These facts constitute substantial evidence supporting the juvenile court's finding that father "has continued to abuse drugs" and also buttress a reasonable inference that father may be "backslid[ding] into more serious drug use." (*Rita L. v. Superior Court* (2005) 128 Cal.App.4th 495, 506.)

In *Rita L.*, the court held that a single positive drug test, without evidence the mother had previously abused that drug, did not establish her child could not safely be returned to her custody. The issue was identified as whether the mother's "failed drug test, viewed in the context of this case, constituted substantial evidence that returning [the child] to her custody would 'create a substantial risk of detriment to the safety, protection, or physical or emotional well-being of the child.' [Citation.]" (*Rita L. v. Superior Court*, *supra*, 128 Cal.App.4th at p. 505.) In reversing the order, *Rita L.* noted, among other things, that "[t]his incident is significant only if it is viewed as a likely first step in [mother's] backslide into more serious drug use. And while such a progression is always possible, there is little (if any) indication that was happening here. [Mother] did not ignore or minimize the danger. She made no effort to argue (as some might) that her ingestion of a single prescription pain killer was insignificant. Instead, she discussed the incident with her AA sponsor, the drug testing personnel, and her social worker. [Mother] was, in other words, quite proactive in addressing the lapse." (*Id*. at p. 506.)

Here, in contrast, father's history of abusing cocaine and his continued claim he did not use it notwithstanding the positive drug patch test results can reasonably be viewed as an attempt to ignore the problem by denying it exists. On appeal, he minimizes the danger by arguing that testing positive for cocaine is insignificant. And unlike in *Rita L.*, father made no effort to address his apparent lapse.

The court was not required to wait for actual harm to the children to occur before intervening. As stated in section 300.2, the juvenile court may act to "ensure the safety, protection, and physical and emotional well-being of children who are at risk of . . . harm." And a home "free from the negative effects of substance abuse is a necessary condition for the safety, protection and physical and emotional well-being of the child." (§ 300.2) As noted by the social worker, father may have been the children's sole caretaker at times and a parent who uses illegal substances has a reduced ability to care for his children. Under the circumstances presented, the court could reasonably find by clear and convincing evidence that the children could not safely remain in father's custody.

Father also contends the court did not consider less drastic alternatives before ordering the children removed from his custody, such as by allowing him to retain custody while he participates in a stringent program under SSA's supervision. But that option had already been in place for the past four years and had not been sufficient to prevent the current situation.

Moreover, section 361, subdivision (c)(1) provides that the court "shall consider, as a reasonable means to protect the minor, the option of removing an offending parent . . . from the home[and] . . . allowing a nonoffending . . . parent to retain physical custody . . . ." The court complied with this requirement by ordering father removed from the home and allowing mother to retain custody of the children. That fact distinguishes this case from *In re Basilio T.* (1992) 4 Cal.App.4th 155, superseded by statute on another ground as set forth in *In re Lucero L.* (2000) 22 Cal.4th 1227, 1239-1242, and *In re Jeannette S.* (1979) 94 Cal.App.3d 52, cited by father, where the juvenile courts ordered the children placed in foster care immediately after the initial section 300 hearing.

DISPOSITION

The orders are affirmed.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

O'LEARY, J.

ARONSON, J.